ORIGINAL

No. 18-8305

In the Supreme Court of the United States

February Term, 2019

ZAINULABEDDIN, PETITIONER

V.

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES- RESPONDENT(S)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT 17-11888, 17-12134, 17-12376

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QUESTION PRESENTED FOR REVIEW

The Supremacy Clause of the United States Constitution (Article VI, Clause 2) establishes that the Constitution, federal laws made pursuant to it.....constitute the supreme law of the land. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government.

Under *Ex Part Young*, the dichotomous strain of jurisdiction-stripping law and sovereign immunity jurisprudence tempered to uphold Supremacy Clause of the Constitution as an exception. 209 U.S. 123 (1908). In *Ex Part Young,* the state laws were deemed unconstitutional for violating due process clause of the fourteenth amendment and dormant commerce clause. Pursuant to court of appeals authority under federal question jurisdiction for this case; the court negated federal preemption for substantive issues that constitutional rights and congress intent for federal laws enacted to protect those rights.

1) Did the lower court violate Commerce Clause of the constitution of Article 1, section 8, Clause 3; when it denied principal's interest to maintain uniformity of state laws for Direct Fed Loans funded by taxpayers which impact interstate commerce and violated the intent of diversity jurisdiction? *U.S. v. Deveaux* 9 U.S. (5 Cranch) 61, 67 (1809).
2) Did the *quasi-judicial* court violate the fourteenth amendment of the constitution to plaintiff's property rights when denying federal preemption under judicial estoppel and denial of waiving state's sovereign immunity under the Eleventh Amendment pursuant to collateral estoppel doctrine defense: when the initial federal proceeding as per contractual duties of the principal, United States Department of Education, Office of Civil Rights for regulatory taking plaintiff's *patent property right* under Title II of American Disability Act during investigation; which was tainted by perjured testimony, abusive dilatory tactics and conflict of interest that impacted the jurisdiction of this case? *White v. Ragan,* 324 U.S. (1945).
3) Did the district and appellant court exceeded its jurisdictional authority when it entered court orders without the presence of necessary interpleader party; United States Department of Education to this suit to which more than $200,000 of United States Department of Education Fed loan Servicing funds and federal interests as per Master of Promissory Note contract are in stake? *Treines v. Sunshine Mining Co.,* 308 U.S. 66, 74 (1939).
4) Did the Appellant court violate plaintiff's fourteenth amendment right when it denied writ of injunction based on weighing *eBay four factor* test when plaintiff's *patent utility right* under ADA Amendment Act

(ADAAA) was infringed due to misrepresentation from 2009 to 2012 as a result of defendant's pre-textual discrimination under Title VII [Asian race: a matter public interest]; and retaliatory dismissal in 2013? *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006).

5) Did the appellant court violate plaintiff's fourteenth amendment right when disavowing Congress intent for ADAAA 2008 and Catchall statute of limitation for her claims, I-VI. 42 U.S.C 12101; 154 CONG. REC S8841 (daily ed. Sept. 16, 2008).
6) Did the appellant court violated constitutional rights for not abrogating state's eleventh amendment immunity under its powers granted by section 5 of the fourteenth amendment?

PARTIES TO THE PROCEEDING

Pursuant to the Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Courts of Appeals for the Eleventh Circuit.

University of South Florida Board of Trustees (Notice of Appeal dated May 22, 2017)

And parties that do not appear in the caption of the case on the cover page. A list of parties to the proceedings in the court whose judgement is the subject of petition is as follows:

Secretary of United States Department of Education, Mrs. Devos
&
United States Department of Education, Office of Civil Rights of Atlanta

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In the Supreme Court of the United States

PETITION FOR WRIT OF CERTORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgement below.

OPINIONS BELOW

The decision of the United States Courts of Appeals for the Eleventh Circuit for petition for panel rehearing appears at Appendix A, 1a to the petition and is unpublished. The opinion of the district court for the case appears at Appendix D, 31a to the petition and is unpublished. The decision of the court of appeals for the eleventh circuit for the consolidated appeal appears at Appendix B, 3a to the petition and is unpublished. The decision of the final agency decision from United States Department of Education, Office of Civil Rights of Atlanta appears at Appendix E, 5a

JURISDICTION

The date on which the United States Courts of Appeals for the Eleventh Circuit decided on petitioner's case was on September 5, 2018, and a timely filed petition for panel rehearing was denied on November, 19 2018. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 1331, 1332, 1441, 1367, of Title 28 of the United States Code. And ADA Amendments Act of 2008.

STATEMENT OF CASE

A. Preliminary Statement

This suit is brought forth for claims under Section 504 for breach of fiduciary duties (Count I), negligent misrepresentation (Count II), breach of contract (Count III), unjust enrichment (IV), disability discrimination (Count V) and retaliation on the basis of disability (Count VI) against Univ. of South Florida. The University is a public state agency that is receives federal financial assistance. U.S. Department of Education is the federal agency that establishes policies on federal financial aid for education, and distributing as well as monitoring those funds and prohibits discrimination, including against violations of Title II and section 504 and ensures equal access to education.

The jurisdictional question was raised at the time of filing the complaint at the state court in Thirteenth Judicial Circuit. The defendant transferred the case to the Federal District Court under federal question jurisdiction 28 U.S.C § 1331 and diversity of citizenship, 28 U.S.C § 1332 on March 17, 2016. The judicial interpretation of 28 U.S.C § 1331 requires that "federal issues can be ascertained from plaintiff's well-pleaded complaint". *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). on April 13, 2016, well-pleaded complaint survived motion to dismiss under Rule 12(b); in which a legal determination was made that the court had jurisdiction to grant relief.

Petitioner sought de novo review of her case based on federal preemption of Amendment Act of 2008 of the American Disabilities Act of 1990 (ADAAA) and Section 313 for four-year statute of limitation from the date of accrual of the claims.

Petitioner set forth reasons that the defendant's eleventh immunity is waived; abrogated by the congress under section 5 of the fourteenth amendment.

1. Court proceedings

Plaintiff's complaint alleges violations of Title II of the American with Disabilities Act, 42 U.S.C. § 12131 et seq. The district court had Jurisdiction pursuant to 28 U.S.C. § 1331. On April 19, 2017; the district court granted a final order of summary of judgement in favor of defendant based on her claims that were barred by state's sovereign immunity. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291 for final order and 28 U.S.C. § 1331 for federal question jurisdiction and diversity jurisdiction for 28 U.S.C. § 1332.

Three notices of appeal were consolidated at the district court. First, notice of appeal was for the order granting defendant's summary of judgement was filed on April 26, 2017, Case No. 17-11888 (A-1487)[1]. The second notice of appeal was filed on order denying motion for reconsideration on May 10, 2017 which was submitted on May 1, 2017 under 60(b); Case no. 17-12134 (A-2178). The third notice of appeal was filed on order denying opposition of billing tax costs on May 22, 2017; Case no. 17-12376 (A-2431).

[1] Designation for "A". "A" refers to the page number for Appellant's Appendix filed at the USCA Eleventh Cir. on September 05, 2017.

The notice of appeal for motion for reconsideration for collateral claims for Count I-VI (Dkt. 54) to USCA Federal Circuit. *Bowen v. Massachusetts*, 108 S. Ct 2722 (1988). USCA Federal Circuit Per Curiam final order and mandate of her Petition for Panel Rehearing dated July 20, 2017, stated in the footnote,

> "because the court lacks jurisdiction over her appeal, Ms. Zainulabeddin's pending motions as to the *merits of her case* are denied as moot".

Subsequently, Petition for Writ Certiorari for the federal circuit was filed at the US Supreme Court on October 26, 2017 that was due on October 25, 2017. The accompanied motion to file Petition out of time was denied on December 2017. Thus, with respect to argument stated in her pleadings at the US Supreme Court, No. 17M65; she filed a new lawsuit at the Federal Court of Claims, 17-1955 against United States Department of Education for collateral claims that would aid the Eleventh Cir. in adjudicating the appeal; pursuant to this case to which more than $250,000 of Federal loan servicing funds. The funds at dispute for Claims I-VI with respect to contractual obligations between the plaintiff, defendant and the United States as per Master Promissory Note for enrollment at USF MCOM from 2009-2013. Pursuant to FCC local circuit rule, 40.2; a notice of directly related case was filed at the Eleventh Cir[2]. On December 12, 2017 and a request for motion to stay pending Federal Court of Claims ruling on the collateral issue was stated in her reply brief to the Eleven Cir, including a

[2] Dispute based on premises of Statutory provision that created a new constitutional right due to enactment of ADAAA 2008.

copy of the complaint and relevant documents. The Judge at the Federal Court of Claims granted defendant's motion to dismiss pursuant to ripeness of jurisdiction, 28 U.S.C § 1500 in March 2018. A notice of appeal was filed at the USCA for the Federal Circuit. Defendant's motion to dismiss the notice of appeal at the Federal Circuit was denied. Appellant withdrew her notice of appeal at the Federal Cir. with respect to vexatious costs and burdensome harm for pursuing two suits simultaneously; and the case was closed on November 20, 2018; pursuant to 28 U.S.C § 1500. The Petition for Panel Rehearing at the Eleventh Cir. was denied on November 19, 2018.

2. Abrogation of state's sovereign immunity

The district and eleventh Cir. denied abrogating and waiving state immunity for her claims. Congress has expressly conditioned receipt of federal funds on waiver of the States' Eleventh Amendment immunity to private suits to enforce Section 504 of the Rehabilitation Act of 1973, 28 U.S.C § 295 at the Federal Court. Congress expressly abrogated the States Eleventh Amendment immunity to private suites in federal court 42 U.S.C. § 12202. Congress may abrogate a State's sovereign immunity pursuant to valid exercise of its power to enforce the Fourteenth Amendment, Section 5. See *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). Congress's prophylactic congruent and proportionate response is appropriate for public interest.

Fourteenth Amendment legislation is applied to cases implicating institutionalization under the Title II of the ADA.

In *Lane,* it was determined that based on the element of "access to courts"; the institutions decisions to deny accommodations cannot be based on justification of "ordinary cost considerations and convenience alone". See *Lane,* 124 S. Ct. at 1994. The court remarked on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provisions of public services". Id at 1991.

The congress determined that a necessary prophylactic legislative was necessary based on historical predicate for systemic deprivation of fundamental right and it is no longer a dispute. See *Miller v. King,* 384 F. 3d 1248, 1270-1272 (11 Cir. 2004). In *Buck v. Bell;* the compulsory sterilization law was upheld; "in order to prevent our being swamped with incompetence"; it is better for all the world; if instead of waiting to execute degenerate offspring for crime, or to starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind "three generations of imbeciles are enough". 274 U.S. 200, 207 (1927). Congress has also heard unjustified institutionalization and unconstitutional treatment of persons with disabilities in state facilities which included seclusion in rooms, restraints and neglectful, abusive and willful indifference that was an "difficult and intractable problem" that warranted added prophylactic measures in response". See *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003). Title II provides proportionate response to history and also congruent response with the requirement of the Due process and Equal Protection Clauses. The congress requires the state to treat people with disabilities in accordance with their

individual needs and capabilities. The congress also concluded there was a need to balance the risks exists when some state officials many continue to make placement decisions based on hidden invidious class-based stereotypes or animus that would be difficult to detect or prove and State's legitimate interests. See *Hibbs,* 538 U.S. at 732-733, 735-736.

Congress determined that Title II prophylactic response was necessary when the state persistently refuses to follow the advice of its own professionals and is unable to justify that its decisions was based on administrative or financial considerations that there was a risk of unconstitutional treatment. See *Hibbs* 538, U.S. at 736-737. The Title II also resolves the unconstitutional exclusion of people with disabilities from their communities, schools and other governmental services. The proper remedy under Title II accomplished integration. See *United States v. Virginia*, 518 U.S. 515, 547 (1996). *In re Employment Discrimination Litig. Against Ala.*, an Eleventh Amendment challenge to disparate impact claims was raised, because they were congruent to the reach of Article 5 of the Fourteenth Amendment by virtue of of their functional equivalence to disparate treatment claims. 198 F.3d 1305, 1321-22 (11th Cir. 1999). In *Washington v. Davis*, the court held that violation of Equal Protection Clause of the Fourteenth Amendment requires proof of discriminatory propose to which the decision maker chose the course of action "because of", not merely "in spite of", that affects the protected class. 426 U.S. 229, 239 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 278 (1979).

The state has substantial authority in determining the last word over constitutional issues. However, jurisdiction-stripping proposals have enabled Supreme Court to review particular substantive area of the law.

The powers of the congress is broad in justifying checks in the tripartite system of protecting the constitutional rights. The state protects the interests of is sovereign immunity, whereas the federal protects the people. In *Alden v. Maine*, the court recognized constitutionally protected sovereign immunity for state based on principles of federalism and state dignity. 527 U.S. 706, 715 (1999). Whereas, in *Ex parte Young*, the court recognized that certain exceptional cases against state officials to uphold the Supremacy Clause of the Constitution. 209 U.S. 123. The majoritarian check is needed, when state's sovereign immunity violates constitutional rights of humanity. The supreme court has consistently held that the principles out of "system of federalism" is one in which the state courts share the responsibility for the application and enforcement of federal law. *Howlett v. Rose*, 496 U.S. 356, 372-73 (1990).

The Supreme Court appellate jurisdiction grants jurisdiction to the court "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, cl. 2. The supreme court shall also have appellate jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make." Id. 2 cl. 2. The 1789 Judiciary Act, the Supreme Court's appellate jurisdiction over state cases "was limited to cases in which a state court rejected claim of federal right".

In *Green v. Mansour*, the court highlighted prospective relief of *Ex Parte Young* as "giving life to the Supremacy Clause" because "remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law". 474 U.S. 64, 68 (1985).

The Eleventh Cir. Ruling reaffirmed that state agency is immune from federal constitutional violations. In *Owen v. City of Independence*, the Supreme Court held that congress abrogated or dissolved any claim a municipality that could have to the principle of sovereign immunity. 445 U.S. 622, 647-48 (1980). Whereas in *N. Ins. Co. of N.Y v. Chatham County.*, it rejected a county's claim of sovereign immunity, that "only States and arms of the State possess immunity from suits authorized by federal law. 547 U.S. at 193 (2006). To abrogate state sovereign immunity, the court has held that there is a higher standard of fault than negligence for municipal liability.

In *City of Canton v. Harris*, the court held that a standard less than deliberate indifference is necessary. 489 U.S. 378, 391-92 (1989). In *Thompson v. Connick*, the court held that state claims that exercise the its immunity to the degree that leads to malicious prosecution was not viable for it was counteracted with absolute prosecutorial immunity. 553 F. 3d 386, 846 (5th Cir. 2008). The federal doctrine inoculates local government and their agents from constitutional accountability, when constitutional violation have taken place. Suing the state agency for constitutional violation requires it to meet a unique causation requirement, to which the plaintiff must demonstrate, at a minimum, that a "final policymaker" exhibited deliberate indifference to constitutional

rights or exhibited deliberate indifference to known or probable violations[3]. In *Elliott v. Jones*, the court held that deliberate indifference is defined as requiring (1) an "awareness of facts from which the inference could be drawn that a substantial risk of serious harm exists" and (2) the actual "drawing of the inference." U.S. Dist. LEXIS 91125 (N.D. Fla. Sept. 1, 2009)

Plaintiff alleging unconstitutional act must also show that "his injury was caused by a ... policy, custom or practice of deliberate indifference to medical needs, or series of bad acts that together raise the inference of such a policy. *Shields v. Ill Dep't of Corr.*, 746 F. 3d 782, 796 (7th Cir. 2014). In *Thomas v. Cook Cnty. Sheriff's Dep't.*, the court held that plaintiff asserting a policy or practice claim must demonstrate that there is a policy at issue than a random event. 605 F. 3d 293, 303 (7th Cir. 2010). In *Farmer v. Brennan*, the could held that intentionally delaying medical care for a known injury (i.e. a broken wrist) has been held to constitute deliberate indifference. 511 U.S. 825 (1994). A constitutional violation occurs only where the deprivation alleged is, objectively, "sufficiently serious," and the official has acted with "deliberate indifference" to inmate health or safety. *Wilson v. Seiter,* 501 U.S. 294, 298 (1991). In *West v. Atkins,* the court held that a plaintiff must allege the violation of a right secured by the federal constitution or laws and must show that the deprivation was committed by a person acting under color of state law (or federal law). 487 U.S. 42, 48 (1998); *Street v. Corp. of Am.,* 102 F.3d

[3] Smith, Fred. (2016). Local Sovereign Immunity. Columbia Law Review, 116.

810, 814 (6th Cir. 1996). To succeed on a claim of deliberate indifference, plaintiff must satisfy two elements, an objective one and a subjective one. The objective element is satisfied by showing that plaintiff had a serious medical need. To satisfy the subject component the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the [ ], that he did in fact draw the inference, and that he then disregarded that risk. *Farmer v. Brenman*, 511 U.S. 825 (1994).

On appeal, plaintiff set forth to make a claim for medical malpractice. For she was misrepresented the results of her neuropsychological evaluation from 2010 to 2012, thus could not be on medications, that are only prescribed by a physician if one has an confirmed ADHD diagnosis in the report. The subject element was shown when Dr. Specter stated during depositions that he knew the contents of the report including that she had a previous ADHD diagnosis, that it stated that she would benefit from accommodations for her disability. However, he continued to misrepresent the report, despite the fact she was failing and led to dismissal from the program. Additionally, he violated the federal regulations set in place by US DOE OIG, that states to have a Satisfactory Appeal Process to fully document and report to US DOE, that if the student has a disability; it is an obligation of the financial aid officer to ensue corrective steps are taken so the student can benefit from the course of study.

3. Commerce clause and Diversity jurisdiction

a. "sham mediation": abrogating state immunity

In re. Addison, the court stated that debtors whose obligations that are large enough to invoke Federal diversity jurisdiction to challenge state agency's actions, based on undue hardship grounds. 240 B.R. 47 (C.D. Cal. 1999). The borrower defense was raised in her complaint, prejudicial administrative proceedings and application to Fed loan. The case required oversight of Secretary of Education for reimbursement of federal loans preempt state's substantive law under respondent superior to which University as an agent is required to disclose pertinent facts that raise borrower defense.

Eleventh Cir. denial of preempting federal law and granting defendant's motion to strike petitioner's affidavit disclosing contents discussed during mediation. The act raises concern that negate U.S. Department of Education's declaration in Federal Registrar, Vol. 83, No. 211, regarding students becoming victims of "cottage industry" of opportunistic attorneys and agents who unnecessarily prolong lawsuits, playing the game of federal-state jurisdiction, by suppressing evidence, omitting facts, cut corners via procedural tactics when in fact, the merits of the case have long been decided. One litigator would describe this problem as:

> [I]f.....I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possible can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this never gets resolved.....because I know the language. I know how to make it look like I'm heading in the that direction. I make it look like I can make all the right noses in the world, like this is the most wonderful thing involved in which I have no intentions of ever resolving this. I have intention of making this the most expensive, longest process but is it going to feel good. It's

> going to feel so nice, we're going to here and we're going to talk the talk but we're not going to walk the walk[4].

The Defendant has yet to inform as per their contractual obligation of the presence of the lawsuit proceedings to Secretary of Education. Additionally, it has an obligation to inform the conversations that took place pertaining to federal funds in dispute during mediation of more than $250,000 federal loan. The conversations involved reimbursement of Federal funds that are financed by tax payer's money and is of public interest, interest to US DOE Fed loan Servicing and also the United States. As a public institution, and a federal financial aid recipient; Defendant is well aware that Federal jurisdiction would governs the rules for the Mediation. The defendant filed a motion to strike affidavit stating statutory defense under the state law, when the governing factor is the intent of the jurisdiction [diversity jurisdiction, for petitioner was residing out of state for school and accrued collateral damages][5].

b. Misappropriation of Interpleaded funds

In *Craig Milhouse and Pamela Milhouse v. Travelers Commercial Insurance Company,* the court ruled that to exclude crucial evidence would deny *Travelers* of its due process right to present a defense. No. 13-56959 (9th Cir. 2016). The *Cassel v.*

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[4] Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 592 (2001).

[5] Note: Defendant also acknowledges in its reply brief that her appeal seeks *de novo review* under the federal presumption.

Superior Court judicially crafted a due process exception to the mediation confidentiality:

> We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such result would violate due process, or would absurd the results that clearly undermine the statutory purpose. 51 Cal. 4th. 113, 119 (2011).

The mediation conducted on March 22, 2017, was a "sham" since the Defendant did not uphold its end of contractual obligation under respondent superior for the "interpleaded funds" that it offered. F.R. Vol. 83 No. 211. The defendant, as per principal-agent Fed loan agreement is required to inform the Secretary of US Department of Education, the oversight authority for matters related to federal student funds and to federal interest that align to the objectives of Federal Direct Loan Program.

c. No jurisdiction to conduct a mediation

Both the Federal and state law are in favor to Petitioner's position for disclosure of contents of the mediation that would have abrogated state immunity. The mediation fees that are not paid raises an affirmative defense and opens the door to admission of evidence showing the mediation resulted in payment. *Fisk Electric Co. v. Solo Constr. Corp.,* 417 F. App'x 898, 902 (11th Cir. 2011). The FLA. STAT. 44.405(6) stated that the Act specifically provides that a party who "makes a representation about privileged mediation communication waives the privilege....to the extent [needed] for the other party to respond" properly. The appellate court affirmed. *Id.* In *Ungerleider v. Gordon*, the court held that state substantive law provides additional protection for evidence beyond

what the federal evidentiary rules provide, when it confirmed that the district court did not error in the application of the Act. 214 F. 3d 1279, 1282 (11th Cir. 2000)[6]. Furthermore, Florida Stat. 44.05(1) provides exception to allow litigant to disclose ongoing criminal wrong doings and abuse. In *Pitts v. Francis,* the judge held that since the mediation was a "sham"; there could be no protected communication and was not entitled to confidentiality. N. 5:07CV169-RS-EMT, 2007 WL 4482168 at 13 (N.D. Fla. Dec. 19, 2007). The Judge in the same case stated that the mediation technically did not occur since no confined parameters existed that was aligned to the governing rules, statutes and relevant law that is a prerequisite of a jurisdiction.

d. No jurisdiction to conduct a mediation

The court overreached its authority without the necessary party, to which this case and interpleader funds are in dispute. United States. Department of Education states in Federal Register Vol. 81, No. 211 that if the litigation requests stipulated demand to which involves Federal Funds; it is deemed as an "triggering event[7];" it is fiduciary duty of the University to inform the Department so that it can carry out its "prophylactic and preventative measures" to protect other students, public interests, tax payers money, and prevent further collateral damages in which expedited resolution to the dispute is

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[6] Fran L. Tetunic. (2011). ACT DEUX. *Confidentiality after the Florida Medication Confidentiality and Privilege Act.* Nova Law Review, Vol. 36(1), Art. 4.

[7] Borrower defense claims; a copy of the Fed loan Discharge Form was provided to USF Health General Counsel, Mrs. Roberta Burford and appropriate officials in support of her Petition for Readmission in 2014.

necessary. The department further confirmed in a statement FR Vol. 81 No. 211 to not hold arbitration (mediation) that involve federal funds without informing principal superior. The intent of the statement was to discourage a venue of gamesmanship of procedural tactics against students to compel the student to settle to which it had no authority. The university's motion to strike is primarily a defense to conceal their "standard procedures" of unauthorized use of settlement procedures for funds that involve direct loan program. Furthermore, the Fla. Stat. 44.405(4)(a)(2) states that mediation confidentiality is waived if it willfully used to commit crime, commit or attempt to commit a crime, conceal ongoing criminal activity. To exclude crucial evidence would deny due process right to present a defense and undermine statutory purpose. In *Wyle v. R.J. Reynolds Indus., Inc.* states that it has inherent power to dismiss action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with orderly administration of justice. 709 F. 2d. 585 (9th Cir. 1983).

4. Evoking Federal jurisdiction under common nucleus of operative fact

In *Mine Workers v. Gibbs*, court held that based on Common-nucleus-of-operative fact test, a federal court will have jurisdiction over state law claims. 383, U.S. 715 (U.S. 1966). The federal court can exercise supplemental jurisdiction under 28 U.S.C § 1367; for those state law claims that that arise from the same facts as the federal claims with common nucleus of operative facts. *Id* and 28 U.S.C § 1441(c)(1) and 28 U.S.C § 1367 and 28 U.S.C § 1331. The collateral issue for time barred state claims for regulatory taking and governed under judicial estoppel by a Federal Agency in quasi-judicial form;

for investigation of her allegations filed on September 2014, after exhausting administrative remedies under continuing violation that were the also Count I to VI. In *Adams v. City of Indianapolis*, the court held that each discrete act "starts a new clock for filing charges." 742 F.3d 720, 730 (7th Cir. 2014).

a. *Regulatory Taking Clause*

Plaintiff's complaint states the necessary elements under the determinative, freestanding test for the question under collateral estoppel defense as per compliance to the Master Promissory Note that constitute regulatory taking[8]. The court of *Penn Central* identified discrete factors:

> (1) impact of challenged regulation on the claimant, viewed in the light of the claimant's investment-backed expectations and
> (2) character of governmental action, viewed in light of the principle that actions that closely resemble direct exercises of eminent domain are more likely to be compensable takings than are garden-variety land use regulations.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

Plaintiff's complaint states these necessary elements. (1) Impact of challenged regulation: dismissal of her complaint at the district court, loss of her property interest to continue her medical education, and aggrieved collateral damages (Complaint Dkt. 1, p. 10.; No. 16). (2) Character of governmental action: ignoring preponderance of evidence before the agency, relying only on University's penalty of perjury testimony that is not supported by evidence that was before the agency, omitting core elements of her

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[8] John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin*?, 52 LAND USE L. & ZONING DIG., Jan. 2000.

discrimination as stated in Petition for Readmission Letter and decision; abuse of discretion in changing its course of investigation proceedings to not investigate her Course Appeals for EBCR II and Doctoring II, lack of policy consideration that govern her complaint that is enforced by Dept. of Ed., i.e. ADAAA , Section 504 and Title VI and contested conducted as stated in her complaint (Complaint Dkt. 1, p. 16-40, Count II: Regulatory Taking Case, p. 16-23).

A *de rigueur* decision making by court of appeals have reversed *sua sponte* dismissals for expiration of applicable statute of limitations. *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012). The Article III court, has supplemental jurisdiction under Section 1367(a) of Title 28 of the United States Code, over a constitutional case for claims based on federal question jurisdiction, 28 U.S.C § 1331 to involve required joinder parties under 27 U.S.C. § 19 (a) and 28 U.S.C § 1346(b)(1); who have liability for claims that have a "common nucleus of operative fact". *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). In *Newin Corp. v. Hartford Accident and Indeminity Co.*, the court ruled against civil actions for perjury based on the policy that to permit a judgement to be later challenged because it was allegedly tainted with perjury "would be productive of endless litigation". 37 N.Y. 2d 211, 33 (1927). The exception to this rule, however[9],

> is based on the principle that fraudulent scheme which is greater in scope than issues that were determined in the action or proceeding may become the basis of action. This is so, although some of the issues had been determined adversely to

[9] Editors *Rule Against Civil Actions for Perjury in Administrative Agency Proceedings: A Hobgoblin of Little Minds,* 131 U. PA. L. REV. 1209 (1983).

> the plaintiff in a prior action or proceeding to which, normally, the doctrine of res judicata would apply. *Id.*

The court has held that for estoppel to be considered in a second proceeding, the first proceeding may need not have been a complete case and can be a sworn statement made to an administrative agency. *DeRosa v. Nat'l Envelope Corp.*, 395 F. 3d 99, 103 (2d Cir. 2010) (noting that [j]udicial estoppel applies to sworn statements made to administrative agencies....").

An omission of civil claims [i.e., acts from 2013-2015] in court proceedings would "thwart judicial process." *Burnes v. Pemco Aeroplex*, Inc. 291 F. 3d 1282 (11th Cir. 2002). Department of Education has participation rules under HEA enforced under Fed loan Servicing MPN stated in the section of Borrower's Rights and Responsibilities Statement:

> require students to exhaust their internal administrative remedies, pursue school's internal complaint process and dispute process before contacting accrediting and governmental agencies about the complaint.

34 C.F.R. Section 685.300

In summary of judgement, her claims were dismissed because they were time barred by state's statute of limitation under the tort law. The master promissory note states The "*Armstrong* Principle" holds that Taking Clause was "designed to bar Government forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In *Timber Co. v. United States*, the court concluded that after federal investigation; the agency decision is final and conclusive, unless the "question of fact is fraudulent, arbitrary, or capricious, so grossly erroneous as to necessarily imply bad faith; or not supported by substantial evidence". 333 F. 3d 1358, 1365 (Fed. Cir. 2003). At the district and federal circuit; Petitioner provided the judge(s) the final agency decision and all documents that was before the agency before rendering their decision (Appendix C, D and E). In *Kappos v. Hyatt,* the court held that "agency's factual findings are reviewed under the substantial evidence standard". 132 S. Ct. 1690, 1694(2012). The substantial evidence standard requires the court to review the administrative record as a whole, weighing both evidence that supports the agency's determination as well as the evidence that detracts from it. *Mayes v. Massanari*, 276 F. 3d 453, 458-59 (9th Cir. 2001). Furthermore, and applicable to this case; when the agency rejects the hearings officer's credibility findings, however, it must state its reasons and those reasons must be based on substantial evidence. *Howard v. Heckler*, 782 F. 2d 1484, 1487 9th Cir. (1986). The court held in *Retlaw Broad. Co. v. RLRB,* that credibility determinations must be upheld unless they are "inherently or patently unreasonable". 53 F.3d 1002, 1005 (9th Cir. 1995).

B. STATEMENT

1. **Quasi-judicial court and Judicial estoppel**

Defendant has provided two conflicting testimonies in two different legal proceedings with the intent to play "fast and loose with the court." *Middleton v. Caterpillar Indus, Inc.*, 979 So. 2d 53, 60 (Ala. 2007). In such circumstances as set forth,

the constitutional provision of Congress has expressed conditioned receipt of Eleventh Amendment immunity to private suits to enforce Section 504 of the Rehabilitation Act of 1973, 28 U.S.C § 295 at the Federal Court. Title II of ADA may also be enforced through private suits against public entities. 42 U.S.C § 12133. Congress has abrogated the State's Eleventh Amendment immunity to private suites in federal court. 42 U.S.C § 12202. To enforce fourteenth amendment Section 5; the Congress may abrogate a state's sovereign immunity pursuant to a valid exercise of its power. *Tennessee v. Lane*, 124 S. Ct. 1978 (2004).

The testimony provided to US DOE OCR conflicted with the sworn oath depositions at the district court (A-1963). Judicial estoppel is an equitable, court-created, discretionary doctrine that may be invoked by either a party or the court *sua sponte*. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). The doctrine prevents a party from taking a contradictory position which it had adopted previously. The circuit court may apply judicial estoppel when two elements are satisfied: (1) the litigant took a position under oath in the proceeding that was inconsistent with a pursuit of the civil lawsuit, and (2) there was a foreseeable intention to make a mockery of the judicial system. The Circuit Court also looks at litigant's "level of sophistication", any explanation for the omissions.

a. Mockery of Justice

The internal administrative appeals at USF MCOM in 2013 were a sham for she was coerced into writing what Dr. Specter stated should be written; he was also present during the APRC hearing. He silenced her when she raised the issue of administrative

error from 2010 to 2012 for unjust enrichment. She pursued last administrative remedy in 2014 after she was given confirmation that Dr. Specter will not play a role in her petition proceedings. Nevertheless, the administrators forwarded all emails she sent to USF MCOM staff to Dr. Specter. The counsels omitted relevant proceedings, i.e. petition in 2014 and US DOE OCR investigation from the district court to escape the statute of limitation defense under continuing violation theory.

USF MCOM Handbook Section IV. E. 6. (1) states that a dismissed medical student can file Petition for Readmission after one year of their original dismissal. Before filing the petition, she received assurance from the new Vice Dean, Dr. Bognar that Specter will have no involvement in her Petition, and requested permission to include course appeals for EBCR II and Doctoring II. After consultation with Gen. Counsel; Dr. Bognar granted her request to the course appeals in her Petition.

b. Suppressed evidence

Defendant's motive was to suppress her rights and forgo statute of limitation. In *Mount Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,* the court held that if the plaintiff can establish that his protected conduct was motivating factor behind his dismissal, the burden shifts to Defendants. 429 U.S. 274 (1977). Defendant only disclosed administrative proceedings that they had controlled by threat and force to "steal facts" up to May 2013, but strategically omitted and suppressed all administrative proceedings that serve as a defense for collateral estoppel doctrine from May 2013 to December 2015 from the court, i.e. petition for readmission and USE DOE OCR investigation and

proceedings. Furthermore, USF has failed to disclose that there was an US DOE OCR investigation from 2014 to 2015; and why it gave inconsistent testimonies during court depositions versus perjury testimony given to US DOE OCR investigator, omitted relevant facts and misrepresenting facts.

c. Abuse of due process and legal procedures

Judicial estoppel is intended to ensure that a litigant "cannot have its cake and eat it too". *Duplan Corp. v. Deering Miliken, Inc.,* 397 F. Supp. 1146, 1177 (D.S.C. 1974). Judicial estoppel protects the sanctity of oaths by strongly deterring lying, intentional misrepresentation, and knowing omissions. The deterrence is rooted in the idea that if the party realizes that he will not be liable for his wrongful acts in later proceedings (i.e., whole truth), if he manipulates the first proceeding by omission, misrepresentation and, lie. Thus, he will most likely not state the whole truth in the first proceeding. In judicial estoppel, the protection of the sanctity of oaths begins in the first proceeding. *Royal Floods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2000) (Describing two-step *Chevron* review, and noting when Congress leaves a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute). In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, the court stated no deference is owed to an agency when "Congress has directly spoken to the precise question at issue". 467 U.S. 837, 842-44 (1984).

In *Public Until. Dist. No. 1 v. Federal Emergency Mgmt. Agency*, the court stated that it generally defers to an agency's interpretation of its own regulations. 371 F. 3d 701,

706 (9th Cir. 2004) (noting "substantial deference"). Though the court has held in *Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, that agency is "not disqualified from changing its mind". 65 F. 3d 1472, 1480 (9th Cir. 1995). However, U.S DOE FOIA Response for that investigation indicated that the investigator relied solely on perjured testimony by USF official that was inconsistent to the official records that were before the agency. The agency was provided with more than 2000 pages of evidence, including medical records, transcripts, copy of the petition. Nevertheless, the facts determined by the agency did not reflect the factual record. It only reflected what USF stated in their perjured testimony. Under federal antitrust laws, the courts have permitted plaintiffs to maintain causes of action for damages caused by alleged misrepresentations made to administrative agencies. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 103 S. Ct. 1234 (1983).

2. **Federal Supremacy Interests: Contractual Federal right of action under Higher Education Act ("HEA") 1965.**

Appellant's opening brief discussed four factors evaluating the existence of private right of action under HEA evoking federal jurisdiction: (1) a federal right was created (2) legislative intent: implicit and explicit (3) whether it meets the objective of the legislative agenda (4) whether federal preemption is underlying congressional intent. *Cort v. Ash*, 422 U.S. 66 S. Ct. 2080 (1975).

The *Cort* test is met here in this case, in which HEA provisions to which it created a new private right of action and congress intent in enacting Amendment Act of Title II

of American Disability Act (ADAAA). Based on contextual circumstances, and the Administrative Procedure Act, 5 U.S.C. § 706(1); borrower defense for violations of Fed loan Master Promissory Notes ("MPN"), creates a new right of actions for undue hardship imposed due to allege actions of misrepresentation and breach of contract. Ultimately, the private right of action that "significantly advances the goal of the statue enacted" is taken under consideration. *Parks Sch. of Business, Inc. v. Symington*, 51 F. 3d 1480 (9th Cir. 1995).

The Section 437(c)(1) of the HEA of 1965, as amended as HEA provides discharge of borrower's loan obligation under section 455(a)(1) of the William D. Ford Federal Direct Loan Program, if the student's eligibility, in accordance to school's defective determination of student's ability-to- benefit (ATB) from the funds were falsely certified by the school.

The MPN contractual relationship, enforcing HEA 1965 that protects special classes, under the Federal law, i.e. in this case, Title II of ADA and Section 504. Such cases, based on provisions of HEA 1965 governed by new MPN signed each academic year, reflects congress intent and expectations that the agency, i.e. University office representing the Department under respondent superior will fulfill the provisions of HEA 1965. The lender liability for school-related claims is that the lender has appointed the school its agent for certain functions and that, under respondent superior, the principal is liable for actions of its agent within the actual or apparent scope of the agent's authority. At USF MCOM, the financial aid office acts as the lender's agent in giving the loan

papers and providing guidance to complete electronic version to the student, in which the lender's portion of the paperwork, and assists student in completing its portion and forwards the paperwork to the lender. The principal, is liable for acts within the actual or apparent authority of the agent, which relates to the student's enrollment in the school, in which misrepresentations made by the agent affects enrollment. *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301 (D.N.J. 1997).

The strength of the agency approach, lies in the misrepresentation, in which if the school makes misrepresentation that induces the student to enroll and sign the loan forms, those misrepresentations can be raised against the lender if the school had actual or apparent authority to make such representations. *Bartels v. Ala. Commercial Coll., Inc.* 189 F.3d 483 (11th Cir. 1999). The agent is responsible for administering the HEA, requiring agency relationship; state claim is preempted, especially if the state law conflicts with the objectives of HEA. 72 Fed. Reg. 32, 410. *Bogart v. Neb. Student Loan Program,* 858 S.W.2d 78 (Ark. 1993) (finding that federal law preempts state law claim based on agency).

HEA gives Secretary "broad enforcement authority to implement provisions of the HEA; including express authority to promulgate regulations to carry out the purposes of the Federal Loan Program. *Student Loan Fund of Idaho, Inc. v. Riley*, 123 S. Ct. 411 (2002). A federal agency interpretation of its own regulations is not controlling if it is "erroneous and inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452 S. Ct. 904 (1997). In this instant case, the borrower has raised a defense, challenging the

constitutionality of the procedures used by the US DOE OCR under HEA, evoking federal question jurisdiction. *Nelson v. Diversified Collection serv. Inc.* 861 F. Supp. 863 (D. Md. 1997). Furthermore, pursuing the right of action under HEA for federal judicial review of agency's action under standard of review embodied in Administrative Procedure Act ("APA"), for challenging its decision that is erroneous or unreasonable based on preponderance of evidence considered by agency during its investigation for OCR Case no. 04-14-2487.

3. Title II of ADAAA 2008

Pursuant to congress intent and the purposes for enacting the amendment to Title II of ADA; ADAAA created a new right for the petitioner to which prospective relief is available under the Federal Catchall Statute of Limitations. The Congress added specific rules of constructions regarding the definition of disability, which provide:

> (C) An impairment that substantially limits one major life activity need not limit other major life activity when active.
> (D) (i) The determination of whether an impairment substantially limits a major activity shall be made without regard to the ameliorative effects of mitigating measures.

42 U.S.C. § 12102(4).

The objective of Congress to enact ADAAA in 2009 was that it wanted to prohibit discrimination by aligning the ADA with other civil right laws. It accomplished that by eliminating the language in the ADA that had prohibited discrimination of an individual "with a disability because of a disability" and replaced it with a simple prohibition on "discrimination on the *basis* of disability" [distinguishing that discrimination was on the

basis of the personal characteristics of the disability in ADAAA and not whether that characteristic exists]. H.R. Rep. No. 110-730, at 16 (2008). Hence the language in ADAAA shifted away from the "proving issues that there is a disability" to "discrimination" itself (A-1858; A-1692-1696).

a. eBay test and ADA

The eleventh circuit denied petitioner's constitutional rights under due process clause when it infringed on her right to pursue medical education and further compounded irreparable injury. In *Antoninetti v. Chipotle Mexical Grill, Inc.*, the court applied patent right pursuant to eBay four factor test for permanent injunction with respect to American with Disabilities Act or Rehabilitation Act. 131 S. Ct. 2113 (2011). For injunctive relief; *eBay* test omits success as a factor and instead doubles up on irreparable injury. The two requirement requires proof that plaintiff "has suffered" irreparable injury to which an injunction would prevent future infringing behavior (continuing violation)[10]. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The courts have articulated regarding presumption irreparable injury in *eBay* test, stating, "'general rule' to which permanent injunction will issue once [continual violations of actions from constitutional challenges, actions under federal regulatory or

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[10] Gergen, Mark P. and Golden, John M. and Smith, Henry E., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions* (March 2012). Columbia Law Review, Vol. 112, No. 2, 2012; U of Texas Law, Public Law Research Paper No. 220. Available at SSRN: https://ssrn.com/abstract=2046149.
***Henceforth, the article is referred as "Accidental Revolution?"

antidiscrimination statute, to diversity actions centered on state tort, contract or statutory law] have been adjudged as valid"[11]. *eBay*, 401 F.3d at 1338.

In cases of continuing injury, pre-*eBay* law has recognized that legal remedies are presumptively inadequate for legally protected interests[12]. [I]f plaintiff demonstrates that effective legal relief can be secured only by a multiplicity of actions, as, for example, when the injury is of a continuing nature, so that plaintiff would be required to pursue damages each time he was injured, equitable relief will be deemed appropriate[13]. [W]here the defendant has wrongfully interfered with the claimant's rights as an owner of property, and intends to continue that interference, the claimant is prima facie entitled to an injunction[14]....[a] prohibitory injunction is the appropriate remedy to prevent the continuation or repetition of a tort"[15].

b. University's infringement of petitioner's patent right under ADA

After discovery of university's grave error for misplacing her neuropsychological evaluation and misrepresenting the contents of the neuropsychological evaluation from 2010 to 2012. Petitioner without knowledge of her accurate diagnosis nor disability, could not be on medications nor request accommodations. Former USF Associate Dean

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[11] Accidental Revolution?
[12] Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity Restitution Section 2.5at 123 (2d ed. 1993).
[13] 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* Section 2948, at 131 (2d ed. 1995).
[14] David Bean & Isabel Parry, Injunctions 2.11 at 18 (10th ed. 2010)
[15] Andrew Burrows, Remedies for Torts and Breach of Contract 514 (3d ed. 2004).
Foot notes 3, 4, 5 and 6; cited from Accidental Revolution?

of Student Affairs, Dr. Steven Specter admits in the deposition that he had knowledge of the report; though not provided to the Petitioner until after she was dismissed in February, 2012. He had "interpreted" report without consulting University's disability office, neuropsychological evaluator, medical school counseling center (HELPS), nor requesting to consult with the assigned psychiatrist at the University's Counseling Center and determined that the results was "equivocal" despite the fact the report stated the student qualifies for accommodations under Section 504 and Title II of ADA. Hence, the Associate Dean failed to participate in interactive process and deceived Petitioner of the true contents of the report from October 2010 to Feb 2012 and determined that the accommodations were unnecessary. The court has held that although no regulation pertaining to students requires an "interactive process," institutions that fail to engage in it are unlikely to prevail on a motion for summary judgment and may face burdens of proof they would not otherwise have to bear. *Ballard v. Rubin*, 284 F. 3d 957, 960 (8th Cir. 2002).

Hence, Appellant without the knowledge of the true contents of the report could not request accommodations from USF Disability Services from 2010-2012 and could not be on ADHD medications since Neuropsych evaluation was considered a "definitive diagnostic criteria" as per USF Counseling Center policies (Dkt. 29-1, p. 117). The student was reinstated, however, as per University protocol; was automatically placed on Academic Probation standing on the *basis of the disability*. The past academic failures

due to "unknown legal disability" were held against the student and contributed to her dismissal the following year for academic and professional reasons.

After reinstatement she was placed in *severe* hostile conditions (Dkt. 23-6, p. 8). She was automatically placed in academic probation standing which is against the US DOE's policies that Congress enforces for individuals with disabilities under Section 504 (34 C.F.R. Part 104). The "F" s in her transcripts remained due to University error, and would be used against her for future employment and residency applications.

The former Associate Dean of Student Affairs of USF MCOM was asked during pre-trial proceedings in deposition; for reason the Petitioner was placed in academic probation standing. The reason was because she had a disability and which is "some sort of deficit" (Dkt. 29, pp. 57-58).

> Q. So, here, number eight, this readmission places Zainulabeddin on academic probation again?
>
> A. Correct
>
> Q. Would that be standard when a student's readmitted?
>
> A. It is—yes, it is standard because obviously that student had left with some deficit, so it is really more standard because of the deficit rather than just readmission, but it's in direct reference to why she would have initially been placed on academic probation.
>
> Q. And there's no---there's no direct reference here to disability or ADHD.
>
> A. There was not. Well, there is---there's an obtuse reference. Where it says that due to new information made available to the committee, that is the new information.
>
> Q. Okay, So is there a particular reason that you're aware of why the issue of disability wouldn't be raised directly in this sort of document?
>
> A. I can't answer that since I didn't craft the language and I'm not sure why if somebody was being coy or just chose to be general. It could be any reason. (Dkt. 29, Dr. Specter Deposition Transcript, p. 56-58).

The school had adopted pass and fail system; and passing grade was set by medical school, as stated by the Pre-Clerkship Curriculum Director in an e-mail dated October 12, 2012 to all course directors in medical school that passing grade was above 74 (i.e. Satisfactory). In Dr. Spector's Deposition, he was asked why Petitioner was failed despite the fact that she had above 74% in the core courses and successfully passed the final comprehensive basic science exam above the benchmark on her first attempt (USF National Board of Medical Examination). The basis was that she was held to a higher standard, i.e. "repeating student standard" because the medications and accommodations are supposed to give undue advantage to students.

4. Judicial backlash to "medicalized approach" to ADAAA.

The panel's medicalized approach reverting to judicial backlash sets a dangerous precedent by negating social disability reform. The panel did not take into account of administrative barriers that prevented her from access to services under Title II and section 504 services (i.e. knowledge of her definite diagnosis). ADHD medications are controlled II substances that are prescribed by a physician. The physician requires a definite diagnosis. She was suggested by medical school's contracting services, HELPS Counseling Ctr to get off medications in Summer 2010, until a definite diagnosis is determined after neuropsychological evaluation. According to USF Handbook, providing a copy of the neuropsychological evaluation is a form of a request. The University paid and arranged for the examination and was faxed to him by the provider. Dr. Specter's next step after receiving the report was to inform her of the results, if he had; she would

not have a two-year lapse of ADHD medications as indicated in her medical records. He should have also contacted USF Disability Services. Dr. Specter did not do that. His intention was to conceal his error in March 2010 which led to her failure in first year of medical school. Appellant had requested accommodations upon recommendation from her physician in March 2010. He refused to provide accommodations stating that a letter from a physician USF Counseling Center is insufficient, the medical school requires a report of 8-hour neuropsychological exam. The medical records indicate that this recommendation was made by USF in March 2010. After failing the first year, she took the 8-hour exam, as required by stipulation stated in her APRC letter. The results came to contrary of his bias. Thus, Dr. Specter resorted to withholding the contents of the report from her. Dr. Specter only revealed the contents of the report after she had already been dismissed in February 2012.

Based preponderance of evidence, it has become apparent that the pretext of discriminatory act against Petitioner in March 2010; for denial of accommodations was because of her race, i.e. Asian. There is a misconception that Asians are "immune to any disabilities". Asian American students are expected to work even harder, sacrifice more than normal population to which their disabilities can go undetected. It is apparent that the "Asian culture" was insufficient to "save her" in Year II of medical school; as she was dismissed.

From the documents that the opposing counsel withheld; and was accidently mailed to her former counsel when she requested a copy of her email account that the

defendant abruptly closed during sensitive discovery period. The defendant's counsel work product revealed that numerous students specific to even one race [Asian Americans[16]] were singled out to fail courses, exams, and recommended to repeat the academic year. Such unusual number of deficiencies for one course [Doctoring] was even raised as a major concern in in an Academic Performance Review Committee meeting, when 35 students in doctoring course were put on the list to remediate. The reduction of the number of students to remediate was rooted from an racial standpoint; i.e. bias of whose names were "Asian" sounding versus non-Asian. This supports the systemic bias in which seven out of eight second-year repeating students for AY2012-2013; were of Asian origin. Thus, Appellant was retaliated and pretext of discrimination against her disability due to her race. Dr. Specter stated during deposition that she was expected perform at a higher standard than "normal students". *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*. ECF. No. 1:14-cv-14176 (filed Nov. 17, 2014).

US DOE regulations that enforces ADAAA 2008 and Title VI; in which it is a discrimination against someone with a disability to render them "non-disabled" because it may have been silent due to other neurobehavioral accommodations (i.e. in this instance "cultural accommodation"). In *Students for Fair Admissions v. Harvard Corp.*, the

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[16] For the purposes of Appellant's motion and reply brief, Asian refers to Americans of Asian descent as defined by U.S. Census Bureau: ancestral origins in East Asia and Southeast Asia. This includes on the Census as "Asian" as "Asian Indian, Thai, Chinese, Filipino, Korean, Pakistani, Japanese, Vietnamese, and Other Asian".

complaint stated that Asian students are discriminated against their culture, i.e. held to a higher standard. 2014 WL 6241935 (D. Mass.) (No. 1:14-cv-14176-DJC). Thus, as evident in this case; the bar is raised even higher of what constitutes as a "white right" [accommodations and treatment for ADHD].

C. REASONS FOR GRANTING THE PETITION

The public interest is served to have a constitutional provision of a federal statute, Title II of ADA Amendment Act of 2008 and antidiscrimination statutes enforced. The discriminatory practice toward students with a disability is still a "standard" at USF MCOM; i.e., placing them in academic probation standing if they were reinstated due to undetected diagnosis and disability and lack of interactive process for students with a disability (US DOE Regulations, A-1911; Univ. of Chicago, June 9, 2011; OCR case no. 05-10-2189).

1. **National issue: Student loan Crisis**

One of the contributing causes of national student loan crisis is lack of regulatory oversight; where students are manipulated. The medical school has no Satisfactory Academic Performance Appeals (SAP) process as required under contractual relationship as a state agency that is participating under the federal loan program pursuant to Higher Education Act of 1965. Appellant did not have to undergo any SAP appeal process when she failed 1st year and 2nd year. The university's errors that came to light during depositions were never reported to Department of Education for her loans. Without regulations in place, the policies are abused.

2. Pre-textual mixed motive: Title VII discrimination against Asians

In *Raytheon Co. v. Hernandez*, the supreme court endorsed the use of pretext proof model in ADA, similar to the one used for Title VII. 540 U.S. 44 (2003). Thus, based on the premises that Title VII and ADA have similar main proof models; courts have recognized disparate treatment and disparate impact. The disparate treatment theory requires proof of motive, whereas, disparate impact theory do not. The mixed-motive model, under the disparate treatment proof model, plaintiff requires one to prove by preponderance that the employer took the plaintiff's protected characteristic into account when making the adverse employment decision. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 93 (2003). In the mixed-motive model framework, the plaintiff requires one to show that the motivating factor in employer's decision-making process was race, sex, religion, color, national origin, or religion. 42 U.S.C. § 2000e-2(a)(1). In *Price Waterhouse v. Hopkins*, the employer is required to show under the framework of intentional causation based on protected class and show based on burden of persuasion, and not mere production; that it would have made the same adverse decision, despite the fact it had not considered the protected characteristic. 490 U.S. § 288 (1989); 42 U.S.C. § 2000e-2(m). Plaintiff requires by the usage of more than mere circumstantial proof of intentional discrimination that unlawful motivation, caused defendant to take adverse action against him.

The court has inherent power to allow Appellant to raise a new issue on appeal that has congruent and proportional impact; waiving the state's sovereign immunity

under Title VII (pre-textual mix-model motive for disparate treatment). In *Jacobsen v. Filler,* the court stated new issue may be introduced by a litigant, or, less often by the appellate court *sua sponte*. 790 F. 3d 1362, 1365 (9th Cir. 1986). The successful new issues concern either court's own power and protection or protection absent or incompetent persons. In civil cases, litigants are bound by the errors and omissions those attorneys make. Absent compelling circumstances, trial and appellate courts normally should come to aid of litigants. *In re First Capital Holdings Corp. Financial Products Securities Litigation*, the court stated "It is elementary that a plaintiff who lacks standing cannot state a valid cause of action; therefore, a contention based on plaintiff's lack of standing cannot be waived under Code of Civil Procedure section 430.80 and may be raised at any time in the proceeding". 33 F.3d 29, 30 (9th Cir. 1994).

The preponderance of evidence that raises a new issue and also pretext of discrimination against her disability is that University has inherent cognitive bias to which numerous student specific to one race [Asian] are repeatedly singled out, which includes Appellant. In the academic year of 2012-2013; nine out of fifteen students failed EBCR were of Asian origin. In Doctoring Final exam, four out of five students of Asian origin failed two or more stations. Doctoring Course Directors, Dr. Valeriano and Dr. Stock reviewed final exams on video to check for errors. The course director exempted all of the non-Asian students on the list, but not the Asian students; and three out of four students who were confirmed to fail both stations in the final exam were of Asian origin. Eleven students were required to remediate Final Exam, in which eight out

of eleven were of Asian origin (73%). After review of the overall performance in doctoring II course; four students were recommended for failure, i.e. Unsatisfactory "U" grade. All four of those students were of Asian origin. Two out of four students were given "U" grade; in which Appellant (with disability) was the only one who was dismissed. Furthermore, from the records that the opposing counsel withheld and from Appellant's personal knowledge; from Academic Years 2004-2012; 60% of students who have failed the year were of Asian origin.

Appellant further analyzed the issue by following similar research protocol of cohort study conducted in AAMC Reports. From the discovery documents that defendant withheld, contained the roster of students for five years, that were enrolled at USF MCOM Class of 2012 to 2016. She compared the students that were initially admitted in the freshman year versus the list of students in the Residency Match List posted at USF MCOM's website. A study by Calbrook, Fessler & Navarete (2016); indicated a strong correlation between origin of names indicating belonging to certain race and evaluator's perceptual bias[17]. Thus, student's name were analyzed with respect to belonging to three races; (1) Caucasian American (2) Asian American (3) other Underrepresented Minority (UIM). Multiple regression analysis was conducted by STAT DISK 12.0.2 regarding the relationship between attrition and retention rate for three respective races. The results and

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[17] Calbrook, C., Fessler, D., Navarrete, C. (2016). Looming large in others eyes: racial stereotypes illuminate dual adaptations for representing threat versus prestige as physical size. *Evolution and Human Behavior*, 37 (2016), pp. 67-78. DOI: 10.1016/j.evolhumbehav.2015.08.004.

AAMC report confirmed the initial contention stated in the motion that attrition and retention rates for Asian students at USF MCOM is substantially lower than other students and national average.

The AAMC report indicated that the percentage of minorities representing a medical school class is rising. The sensitivity and norms toward minority students requires a cultural change in a highly closed-knit profession. Several reports have indicated that among the classes of minority based on race; Asian Americans experience the greatest discrimination in medicine.

3. **National epidemic: Physicians are at risk due to toxic culture of abuse.**

Furthermore, poor treatment of medical students and physicians in training puts the public at risk. It is a national epidemic, known as "Do No Harm" led by Dr. Wible, that "physicians and trainees live in a [toxic] culture of abuse....". The number of suicide rate of physicians and trainees is the highest among all professions and has recently garnered ***national*** attention[18].

4. **Injunction and enforcement to preserve jurisprudence.**

The public interest is served with this injunction because it enforces the integrity of federal judicial process and promotion of public's faith in the judicial system as a whole by protecting the reputation of all courts. Granting injunction forbids the use of

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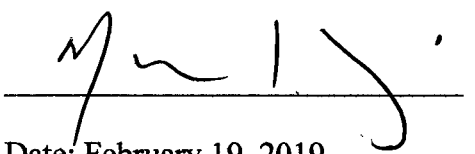
[18] Shinnyi Chou. *Do No Harm: The Story of the Epidemic of Physician and Trainee Suicides.* The American Journal of Psychiatry Residents Journal. (2017) doi: 10.1176/appi.ajp-rj.2017.120406.

intentional self-contradiction...as a means of obtaining an unfair advantage. *New Hampshire v. Maine*, 532 U.S. at 751 (2001). It is a matter of public interest to ensure that justice is served and protects our constitutional rights.

CONCLUSION

FOR THESE REASONS, Alia Merchant respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.



Date: February 19, 2019

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